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No. 02-1632

Supreme Court, U.S
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In The

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Writ Of Certiorari
To The Washington Court Of Appeals
Division III

BRIEF FOR THE STATE OF WASHINGTON

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QUESTION PRESENTED (RESTATED)

Apprendi v. New Jersey, 530 U.S. 466 (2000) and *Ring v. Arizona,* 536 U.S. 584 (2002) hold that a criminal defendant is entitled to a jury determination and proof beyond reasonable doubt of enumerated facts necessary to increase the sentence for a crime beyond the statutory maximum sentence. Under Washington statutes, in the exercise of discretion, a trial court may depart from a standard range sentence and impose an exceptional sentence, not to exceed a statutorily designated maximum sentence, if the court articulates "substantial and compelling reasons justifying an exceptional sentence." WASH.REV.CODE § 9.94A.120(2). The trial court's discretion in this respect is guided but not limited by a nonexclusive, merely illustrative, list of factors. WASH.REV.CODE § 9.94A.390. Is such a sentencing decision subject to the rule of *Apprendi* and *Ring*?

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OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at 111 Wash. App. 851, 47 P.2d 149 (2002) and is reprinted at J.A. 2-23. The order of the Washington Supreme Court denying discretionary review of that decision is reported at148 Wash.2d 1010, 62 P.3d 889 (2003) and is reprinted at J.A. 60. The trial court's sentence and findings are reproduced at J.A. 24-50. The transcript of the trial court's ruling on the question presented is reprinted at J.A. 51-59.

JURISDICTION

The judgment of the Washington Supreme Court denying review issued on February 4, 2003. J.A. 60. The petition for a writ of certiorari was filed on May 5, 2003, and was granted on October 20, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-16a.

STATEMENT

A. FACTS

On October 26, 1998, the Petitioner Howard Ralph Blakely accosted his estranged wife Yolanda Blakely at her

orchard home in Grant County, Washington in violation of a restraining order. J.A. 40-41 ¶2-4. He grabbed her by her wrists and arms, twisting them and bringing her to the ground. J.A. 41 ¶5-6. He knelt on her ribs and he wrapped her head with duct tape and tied her hands tightly. J.A. 41 ¶6. Mr. Blakely carried and walked his wife through the orchard demanding she dismiss the pending dissolution and trust litigation she had instituted against him. J.A. 41-42 ¶7. He warned her that he could get away with murder. J.A. 42 ¶7. Reciting the knives, guns, and ammunition in his possession, Mr. Blakely threatened to kill his wife and himself. J.A. 42 ¶8. Holding a knife to her, Mr. Blakely forced his wife to climb over the tailgate of his pickup, under the canopy, and into a homemade coffin, which he then latched shut. J.A. 42 ¶9. The coffin's length was only three inches longer than Mrs. Blakely's standing height. J.A. 42 ¶9. Pressing a knife to her throat or nostrils and telling her she would bleed to death, Mr. Blakely compelled his wife to reveal the location of various property and documents which he loaded into the truck. J.A. 42-43 ¶10.

When their thirteen year old son Ralphy arrived home from school, Mr. Blakely emerged from behind a tree with a knife and threatened to kill Yolanda and Ralphy if the boy did not obey. J.A. 43 ¶11. Ralphy approached the pickup and heard his mother yelling, kicking, and pleading. J.A. 43 ¶12. While using the restroom, Ralphy looked for a gun to rescue his mother, but could not find one. J.A. 43 ¶13. Mr. Blakely ordered his young son to follow the pickup in his mother's car and threatened to kill Yolanda by blowing a hole through the coffin with a shotgun if Ralphy "tried anything." J.A. 43 ¶13. The thirteen year old escaped at a gas station, but Mr. Blakely proceeded to

Montana with his wife, driving back roads through the night. J.A. 44-45 ¶15-20. Mrs. Blakely was cold, cramped, hungry, and bound throughout the ordeal, unable to remove her clothes to relieve herself. J.A. 45-46 ¶11, 19, 21.

Once they arrived in Montana, Mr. Blakely hid from police at his neighbor Mary Gillespie's house. J.A. 46 ¶23. There he demanded his wife sign over her property and litigation rights, and he engaged in business over the phone with his stockbroker. J.A. 46-47 ¶24. He made frequent phone calls to his live-in girlfriend of two and a half years, Ilse Barros. J.A. 46 ¶24. Eventually Ms. Gillespie escaped the house and alerted police. J.A. 4 ¶4, 47 ¶24. Federal agents arrested Mr. Blakely on October 27, 1998. J.A. 4-5, 47 ¶25.

B. PROCEDURAL HISTORY

On October 27, 1998, the Defendant was charged with the first degree kidnappings of his wife Yolanda Blakely and their 13 year old son Ralphy Blakely. J.A. 1, CP (Clerk's Papers) 1-6. After multiple mental health evaluations, Mr. Blakely requested a jury trial on competency and was found competent to stand trial. J.A. 5-6. Evaluators concluded that Mr. Blakely had high average intelligence, had never been a paranoid schizophrenic, and sought psychiatric treatment only as a means of avoiding legal responsibility. J.A. 5.

On July 18, 2000, Mr. Blakely pleaded guilty to one count of second degree domestic violence kidnapping of his wife with a deadly weapon enhancement and one count of second degree domestic violence assault of his son. J.A.

61-74. The plea reduced the charges from class A felonies to class B felonies.

The charging information was amended for the plea. It informed the Defendant of the maximum penalty of 10 years imprisonment. J.A. 76. The plea statement informed the Defendant yet again of the maximum penalty. J.A. 63. The plea statement informed the Defendant that, notwithstanding the prosecutor's recommendation, the judge might sentence outside of the standard range for substantial and compelling reasons. J.A. 66. The judge repeated this orally. VRP (Verbatim Report of Proceedings) 549-50 ("[D]o you understand that even though that would be the standard range, that the judge could sentence you above the standard range if the judge found compelling reasons to do that?").

At sentencing, the court heard from witnesses under oath and subject to cross-examination. J.A. 8. The court imposed an exceptional sentence of 90 months on the kidnapping conviction to run concurrently with a 14 month sentence on the assault charge. J.A. 8. The court considered the purposes of the Sentencing Reform Act and the uncontested[1] facts that the kidnapping involved "repeatedly and protractedly confining the victim in a

[1] Under the statute, a defendant acknowledges facts introduced at a sentencing hearing by failing to object. WASH. REV. CODE § 9.94A.370(2). While the Defendant objected to the imposition of an exceptional sentence, he did not object to the findings of fact that his thirteen year old son was present during the commission of the crime, nor did he object to the finding of fact that he handcrafted a coffin-shaped box to the measurements of his wife and forced her inside it. J.A. 12 ¶3.

coffin-like box" manifesting deliberate cruelty and intimidation of the kidnapping victim and the minor child observing the acts. J.A. 49. The court found that there were substantial and compelling reasons to depart from the standard range and impose the just and deserved punishment of a 90 month sentence. J.A. 49. The trial judge did not find the defense counsel's reunion explanation mitigated the offense. VRP 1051-53. " . . . Mr. Blakely was not trying as a principal goal to reunite his family . . . His first overtures were you've got to terminate the trust litigation." VRP 1052-53. In the course of the kidnapping, Mr. Blakely stole financial files from his wife's home and concealed them at Ms. Gillespie's house, where they were only discovered months later. VRP 688.

The Petitioner made a motion for a standard range sentence, objecting to the sentence as a violation of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court denied the motion, holding that the requirements of *Apprendi* "do not apply to a case in which the court proposes to sentence the defendant within the maximum standard range, in this case 10 years, adopted by the legislature and proscribed as the appropriate level of punishment for this offense." J.A. 58.

On appeal, Mr. Blakely objected to the exceptional sentence as a violation of the Real Facts Doctrine under WASH. REV. CODE § 9.94A.370(2)[2] and a violation of *Apprendi*. J.A. 15.

[2] As the Petitioner acknowledges, recodifications and amendments in the SRA have not altered the substantive law relevant to this case.

(Continued on following page)

The Real Facts Doctrine precludes a sentencing court from using "facts that establish a more serious crime or additional crimes as the basis for a sentence outside the presumptive range." J.A. 16; WASH. REV. CODE § 9.94A.370(2). Thus, the state cannot use aggravating factors to circumvent charging and proving aggravated crimes. The Court of Appeals found that no aggravating factor violated the Real Facts Doctrine and held that the domestic violence factors (i.e., the cruelty toward the child witness of his mother's kidnapping) clearly were permitted under the doctrine and standing alone supported the exceptional sentence. J.A. 16-18.

Following *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262 (2001), the Court of Appeals held that the *Apprendi* rule is not triggered, because aggravating factors in an exceptional sentence "neither increase the maximum sentence nor define separate offenses calling for separate penalties." J.A. 19.

The Washington Supreme Court denied review. J.A. 60.

The Petitioner has requested this Court's review.

C. SENTENCING IN WASHINGTON STATE.

The Sentencing Reform Act (SRA) of Washington State, codified at WASH. REV. CODE § 9.94A, is a determinate sentencing system which "structures, but does not eliminate, discretionary decisions affecting sentences . . . "

For consistency's sake, this brief refers to the old statutory section numbers in effect for Mr. Blakely's sentence.

WASH. REV. CODE § 9.94A.010. It channels judicial discretion, permitting sentencing within the limits of law (statutory maxima set out in the chapter on substantive crimes at WASH. REV. CODE § 9A.20.021) and granting absolute discretion within more narrow ranges. WASH. REV. CODE § 9.94A.120.

Sentences for two or more current offenses are served concurrently. WASH. REV. CODE § 9.94A.400(1)(a). The more serious of Mr. Blakely's crimes was the kidnapping. J.A. 27. The statutory maximum for the crime of second degree kidnapping is ten years imprisonment. WASH. REV. CODE § 9A.20.021(1)(b); WASH. REV. CODE § 9A.40.030(3).

The seriousness level of second degree kidnapping is a V. WASH. REV. CODE § 9.94A.360; J.A. 27. At sentencing, Mr. Blakely's offender score was determined to be a II.[3] WASH. REV. CODE §§ 9.94A.100 & 9.94A.320; J.A. 27. The standard range for a crime of seriousness level V with an offender score of II is 13-17 months. WASH. REV. CODE § 9.94A.310; J.A. 27.

Mr. Blakely pleaded guilty to a firearm enhancement, which added a mandatory term of 36 months to his

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[3] Note J.A. 64. Mr. Blakely's prior convictions "washed out" and were not factored into his offender score. For example, the prior kidnapping conviction of 1969 washes because there was no known subsequent conviction in the ten years immediately following. His offender score of II is the result of the "present" conviction on violent offenses. WASH. REV. CODE § 9.94A.360(8).

sentence. J.A. 25.[4] The effect of the enhancement was to raise his standard range to 49-53 months. J.A. 27.

The court in its discretion may sentence outside the standard range if it finds, considering the purposes of the SRA, that there are substantial and compelling reasons justifying a different punishment. WASH. REV. CODE § 9.94A.120(2). The statute invites sentencing courts to consider an illustrative list of circumstances that may mitigate or aggravate the offense. WASH. REV. CODE § 9.94A.390. Courts decide as a matter of law if the particular offense is more egregious or more onerous than typical. *State v. Cardenas*, 129 Wash.2d 1, 5-6, 914 P.2d 57, 59 (1996).

The sentencing court in Mr. Blakely's case determined that circumstances (the Defendant's deliberate cruelty manifested toward the victim in confining her in a coffin-like box and his deliberate cruelty toward or intimidation of his minor son who helplessly witnessed his mother's kidnapping) provided substantial and compelling reasons to depart from the range. This determination of substantial and compelling reasons enabled the court to impose a sentence of ten years. The court imposed a sentence of seven and a half years.

[4] In Washington state, the term "enhancement" refers to findings that result in specific, mandatory penalties. Enhancements are treated as elements, requiring they be pleaded in the charging information and proven beyond reasonable doubt. WASH. REV. CODE § 9.94A.125; *State v. Gunther*, 45 Wash. App. 755, 727 P.2d 258 (1986), *review denied*, 108 Wn.2d 1013 (1987). They may not result in sentences beyond the statutory maximum. WASH. REV. CODE § 9.94A.310(4)(g).

On review, the Court of Appeals determined that the exceptional sentence did not violate the Real Facts Doctrine by punishing Mr. Blakely for an aggravated crime and that the finding of substantial and compelling reasons was not an abuse of discretion.

SUMMARY OF ARGUMENT

Judges may find facts that raise sentencing guidelines, so long as those facts do not raise the statutory maximum sentence. Washington law follows the most recent precedents permitting judicial fact-finding within the limits fixed by law. *Ring v. Arizona*, 536 U.S. 584 (2002); *Harris v. United States*, 536 U.S. 545 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Aggravating facts do not raise the statutory maximum sentence set out in WASH. REV. CODE § 9A.20.021 and as interpreted by Washington courts. Therefore, there is no requirement that these facts be found by a jury beyond reasonable doubt.

The visibility requirement for exceptional sentences (courts must articulate their reasons) does not alter in label or by operation the statutory maximum that is authorized by a guilty verdict. A defendant can have no liberty interest in a narrow sentencing range which is not established at the time of plea. Mr. Blakely had notice, a significant rationale of the *Apprendi* rule, of his maximum penalty before pleading guilty. Extending the *Apprendi* rule as the Petitioner proposes is unworkable as circumstances relevant in individualized sentencing are limitless and the resulting jury trials would be administratively prohibitive.

ARGUMENT

I. There Is a Long History of Judicial Fact-finding for Sentencing Purposes "Within Limits Fixed by Law."

Individualized sentencing is constitutionally required in capital cases and statutorily required in noncapital cases. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense" in determining the sentence); *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978) (throughout the country, public policy as reflected in statutes establishes the practice of individualized sentences).

At sentencing, the fullest information concerning the crime and the defendant's life and characteristics is relevant. *Williams v. New York*, 337 U.S. 241, 246 (1949). The court seeks to tailor the type and extent of punishment to the individual defendant, because punishment should fit the offender and not merely the offense. *Id. See also Lockett*, 438 U.S. at 602. The definition of crimes does not automatically dictate the punishment, and where the legislature grants courts discretion at sentencing, the court's "possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant – if not essential – to the selection of an appropriate sentence." *Lockett*, 438 U.S. at 602-03 (citing *Williams*, 337 U.S. at 247).

There are historical bases as well as practical reasons for examining elements and sentencing factors under different evidentiary rules. *Williams*, 337 U.S. at 246. A

court imposes a sentence only after "the narrow issue of guilt" has already been determined. *Williams*, 337 U.S. at 247. *Id.* Under the rules of evidence, the trier of fact during the guilt phase is prevented from hearing prejudicial information that will be relevant later for sentencing purposes. Fed. R. Evid. 404. However, there is no justification for keeping the best available information from the sentencing judge. *Williams*, 337 U.S. at 250-51.

The Constitution does not require a jury to determine every fact relevant in sentencing. *Harris*, 536 U.S. at 549 ("not all facts affecting the defendant's punishment are elements"); *Jones v. United States*, 526 U.S. 227, 248 (1999) ("It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution."); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("[The Court] has never suggested that jury sentencing is constitutionally required.")

The Jury Clause has long coexisted with broad judicial discretion at sentencing within the statutory limits. *Apprendi*, 530 U.S. at 481; *United States v. Tucker*, 404 U.S. 443, 447 (1975) (sentences "within statutory limits" are not subject to collateral attack); *Williams*, 337 U.S. at 246 (there is a long history of judicial fact-finding "within limits fixed by law"); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L. J. 1097, 1125-228 (2001); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001).

In *Apprendi*, this Court explicitly preserved this status – stating the rule that facts must be submitted to a

jury only when their finding increases the penalty "beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. So long as the sentence does not exceed the statutory maximum, "facts guiding judicial discretion . . . need not be alleged in the indictment, submitted to a jury, or proved beyond a reasonable doubt . . . . even if those facts are specified by the legislature and even if they persuade the judge to choose a much higher sentence than he or she would otherwise have imposed." *Harris*, 536 U.S. at 565-66.

Here, the sentence is within the limits fixed by the legislature's unalterable statutory maximum sentence of ten years, a meaningful limit for a class B felony. Thus the legislature's rules suffice to check and constrain judicial discretion.

II. Sentencing Guidelines Which Structure Judicial Discretion Do Not Implicate the Jury Clause.

This Court has held that legislation that structures judges' sentencing decisions does not create a constitutional issue. *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986) ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.") "Within the range authorized by the jury's verdict, [ ] the political system may channel judicial discretion" without implicating the jury requirement of *Apprendi*. *Harris*, 536 U.S. at 567. *See also* Jane A. Dall, *A Question for Another Day: The Constitutionality of the U.S. Sentencing Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617, 1673 (2003) ("What was constitutional before the Sentencing Guidelines cannot be

unconstitutional after the Sentencing Guidelines."); B. Patrick Costello, *Apprendi v. New Jersey: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205, 1250 (2002) ("A compelling purpose of the [Jury Clause] is to protect criminal defendants against potentially arbitrary judges. . . . if [jury trial guarantees] apply to sentencing at all, [it is logical to conclude they] would apply with greater strength to discretionary-sentencing schemes rather than to determinate-sentencing schemes.")

This Court emphasized that "[i]t is critical not to abandon that understanding at this late date [because] legislatures and their constituents have relied upon *McMillan*." *Harris*, 536 U.S. at 567. Indeed, the Washington Supreme Court articulated its reliance upon *McMillan* in deciding the Petitioner's question. *State v. Gore*, 143 Wash.2d 288, 312-14 (2001), *citing McMillan*, 477 U.S. at 92 ("we have consistently approved sentencing schemes that mandate consideration of facts relating to the crime . . . without suggesting that those facts be proved beyond a reasonable doubt").

Washington courts have followed this precedent, holding there is no constitutional right to a standard range sentence, i.e., a stricter (or "less discretionary") application of the guidelines than directed by the statute. *State v. Owens*, 95 Wash. App. 619, 628-29 & n.17, 976 P.2d 656, 661 & n.17 (1999) (citing various federal cases). Washington courts interpret that the guidelines "do not specify that a particular sentence must be imposed," but "are intended only to structure discretionary decisions affecting sentences." *Id.* The SRA "does not establish the illegality of

any conduct. Rather, it provides directives to judges and not to citizens." *State v. Owens*, 95 Wash. App. at 629 n.17, 976 P.2d at 661 n.17. Sentencing guidelines like Washington's standard ranges are designed to structure judicial discretion and to require transparency in sentencing. They are not designed to remove elements from a jury's consideration.

Because the structured discretion of determinate systems does not result in sentences above the statutory maximum, the *Apprendi* jury rule is not implicated. *Gore*, 143 Wash.2d at 314, 21 P.3d at 277 ("Aggravating factors neither increase the maximum sentence nor define a separate offense calling for a separate penalty.")

III. The Washington Exceptional Sentence Statute Is Compatible with this Court's Precedents.

The Washington SRA is consistent with this Court's recent exposition of the narrow rule of *Apprendi*. The *Harris* case is most directly on point, precluding the Petitioner's argument that *Apprendi* extends to sentences within statutory limits.

In *Harris*, the defendant was found guilty at a bench trial of a firearms charge under 18 U.S.C. § 924(c)(1)(A). *Harris*, 536 U.S. at 551. The trial court determined by a preponderance of the evidence that the defendant had brandished the weapon. *Id.* The effect of this finding raised the presumptive sentence under the federal sentencing guidelines from five to seven years. Although the court's finding altered the defendant's range of punishment, it did not raise the sentence above the implied maximum of life imprisonment. This Court held that "not

all facts affecting the defendant's punishment are elements" and affirmed the sentence. *Harris*, 536 U.S. at 549.

The rationale in *Harris* emphasized that the *Apprendi* rule only applied to sentences that exceeded statutory limits. Once a verdict has been reached, "the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury – even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element." *Harris*, 536 U.S. at 566. The holding was consistent with *McMillan*, which *Apprendi* and *Jones* had upheld.

The Court in *Harris* refused to extend the *Apprendi* rule to statutory minima. This forecloses the Petitioner's argument that the Court should extend *Apprendi* to cover guideline maxima as well as statutory maxima. Because the Washington statutory maximum penalty of ten years for Mr. Blakely's crimes is not implied but clear on the face of the statute and court documents, there is even greater reason to uphold the SRA.

The Washington guidelines are distinctly different from the statutes considered in *Apprendi* and *Ring*. *Apprendi* and *Ring* concerned statutes authorizing punishment in addition to that within the court's discretion on conviction and only on proof of one or more specific, enumerated facts. Under the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict. While the statute invites the court to consider various non-exclusive circumstances, no

specific facts need be found for the court to impose an exceptional sentence within statutory limits.

In *Apprendi*, the defendant pleaded guilty to crimes which carried penalties of five to ten years. *Apprendi*, 530 U.S. at 469-70; N.J. STAT. ANN. §§ 2C:39-4a & 2C:43-6(a)(2). A separate statute increased the penalties to twenty and thirty years with a finding of a biased purpose. N.J. STAT. ANN. § 2C:44-3(e). By a preponderance of the evidence, the sentencing judge found a racial motive and sentenced the defendant to a term of twelve years. *Apprendi*, 530 U.S at 471. The Court found that if the defendant had been sentenced based on the verdict alone, his maximum penalty would have been ten years. *Apprendi*, 530 U.S at 483. The twelve year sentence exceeded the statutory maximum.

Mr. Blakely, on the other hand, pleaded guilty to a second degree kidnapping, the statutory maximum penalty for which is ten years. WASH. REV. CODE §§ 9A.20.021 & 9A.40.030. Mr. Blakely's sentence of seven and a half years does not exceed the statutory maximum.

In *Ring*, a death penalty case, the Court noted that under the Arizona court's interpretation of ARIZ. REV. STAT. § 13-703, the statutory maximum penalty authorized by a jury verdict for a first degree felony murder was life imprisonment. The Arizona court explained that the death penalty could only be imposed if at least one out of ten enumerated facts was found. Pursuant to the state court's interpretation, these facts operated as elements of the crime, raising the penalty above that authorized by a jury verdict alone.

In contrast, Washington courts have not interpreted the standard ranges to be the operational maxima authorized by a jury verdict. The statutory maximum in WASH. REV. CODE § 9A.20.021 is the maximum by effect as well as label. Where the range exceeds the statutory maximum, it may not be imposed. Unlike the Arizona death penalty statute, the SRA does not enumerate a finite list of factors that mandate an elevation in the penalty. No specific fact need be found for the court to depart from the standard range.

A. Washington's Sentencing Guidelines Simply Add Guidance and Transparency to Discretionary Sentencing Decisions, and Are Distinctly Different from the Statutes Considered in *Apprendi* and *Ring*.

The critical question raised by the Petitioner is: What is the statutory maximum sentence authorized by Mr. Blakely's plea to a second degree domestic violence kidnapping with weapons enhancement?

The Petitioner argues that the maximum sentence authorized is 53 months imprisonment. This number is the upper end of the standard range for a crime of seriousness level V and offender score II plus a 36 month weapons enhancement. J.A. 27.

The Petitioner's number is the result of a complicated equation with variables yet undetermined at the time of Mr. Blakely's decision to plead guilty. At the time of Mr. Blakely's plea, the offender score on the plea statement represented only the prosecutor's early prediction. WASH. REV. CODE § 9.94A.100 (establishing that the offender score is determined at sentencing hearing, not at the plea

hearing). The offender score is a battleground of issues between the attorneys to be decided subsequent to a verdict (e.g., Can the prior conviction be proven? Is it valid? Has it been vacated? Does it wash out? Was it served concurrently with another offense? Do the current convictions encompass the same criminal conduct?). Former WASH. REV. CODE § 9.94A.360. A defendant can have no liberty interest in a range which results from an offender score that is not yet adjudicated. *State v. Baldwin*, 150 Wash.2d 448, 78 P.3d 1005, 1012 (2003) (en banc) (unanimous decision holding that the guidelines do not create a constitutionally protectable liberty interest). *See also State v. Xaviar*, 117 Wash. App. 196, 205-06, 69 P.3d 901, 906-07 (2003) (the standard range is not a presumptive maximum sentence that accompanies the jury's verdict).[5]

Washington statute and case law determine the statutory maximum, and the language is unequivocal. WASH. REV. CODE § 9A.20.021 (the maximum punishment for a class B felony is ten years); WASH. REV. CODE § 9.94A.120(13) (the statutory maximum is that provided in WASH. REV. CODE § 9A.20); WASH. REV. CODE § 9.94A.420 (when the sentencing range conflicts with the statutory maximum by exceeding it, the statutory maximum rule shall prevail); *State v. Baldwin*, 150 Wash.2d 448, 78 P.3d 1005 (2003) (laws granting significant degrees of

[5] Petitioner's citation to a Kansas holding is incongruous (Brief for Petitioner at 17, citing *State v. Gould*, 23 P.3d 801 (Kan. 2001)), because Kansas indeed has no statutory maximum other than the standard grid or, with a jury finding of an aggravating factor, a multiple thereof. KAN. STAT. ANN. § 21-5401 (2003). There is no comparison with the Washington SRA. Kansas defendants do not have notice of a definitive sentence range, because the applicable grid is undetermined at the time of plea.

discretion, like the SRA, do not create a protectable liberty interest); *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262 (2001) (aggravating factors neither increase the maximum sentence set in WASH. REV. CODE § 9A.20 nor define a separate offense calling for a separate penalty). The maximum sentence permitted for the instant crime as determined by statute and case law is ten years imprisonment.

The Petitioner argues that the Washington court's construction of the plain language of the SRA is mere "characterization" and that the standard ranges operate as maxima. Under the precedents of *Apprendi* and *Ring* the courts consider effect over form as construed by the state court, not by the Petitioner. The Washington courts' construction of the clear statutory language demonstrates that the effective or operative maximum penalty for a class B felony is ten years. Because this is so, this Court's precedent in *Harris* and *McMillan* apply and preclude the Petitioner's claim.

1. The Sentence Limits Provided in WASH. REV. CODE § 9A.20.021 Operate as True Statutory Maxima.

Courts consistently apply the statutory maxima in WASH. REV. CODE § 9A.20.021 in tandem with the SRA. *See* WASH. REV. CODE §§ 9.94A.120(13) & 9.94A.420 (contrasting standard ranges with the statutory maximum in WASH. REV. CODE § 9A.20). This limit benefits defendants by restricting standard ranges.

In theory, it is possible for the standard range to exceed the statutory maximum. Accordingly, the statute establishes a hierarchy. When the range in the grid at

WASH. REV. CODE § 9.94A.310 exceeds the statutory maximum in WASH. REV. CODE § 9A.20.021, the statutory maximum and not the grid shall be the presumptive range. WASH. REV. CODE §§ 9.94A.120(13) & 9.94A.420. When the sentence (standard range or exceptional) plus any mandatory enhancement exceed the maximum, the statutory maximum caps the sentence imposed. WASH. REV. CODE § 9.94A.310(4)(g); *State v. Harvey*, 109 Wash. App. 157, 34 P.3d 850 (2001), *overruled on other grounds by State v. Thomas*, – Wash.2d –, 80 P.3d 168 (2003) (the sum of the base sentence plus mandatory enhancement may not exceed the statutory maximum).

The hierarchy favors defendants, providing an absolute cap and trustworthy notice of the maximum penalty. For example, a defendant with a 9+ offender score who is convicted of a class B felony with seriousness level IX (e.g. sexual exploitation under WASH. REV. CODE § 9.68A.040) has a standard range of 129-171 months, which is in excess of the 10 year (120 month) maximum under WASH. REV. CODE § 9A.20.021(1)(b). In this situation, the courts may ***not*** sentence the defendant to a standard range sentence, but rather must sentence below the cap of 120 months, significantly reducing the sentence.

The maximum in WASH. REV. CODE § 9A.20.021 may also alter the standard range in special rehabilitative sentencing alternatives. Under a drug treatment alternative (DOSA), the court imposes half a standard range sentence. The sentence is calculated by halving the midpoint of the standard range. When the standard range exceeds the maximum, it is capped by the maximum, effectively reducing the sentence. *State v. Brooks*, 107 Wash. App. 925, 29 P.3d 45 (2001) (where the standard

range was 47.25 to 63 months, and the statutory maximum was five years, the DOSA sentence was calculated by halving the midpoint of 47.25-60).

The Petitioner's proposed extension of the *Apprendi* rule, undercutting a clearly defined maximum, does not benefit defendants.

2. The Standard Range Does Not Operate As the Statutory Maximum Penalty.

Under Washington law, a sentencing judge need not find any particular fact to impose a sentence outside the standard range; the judge need only articulate a reason for the departure. This is a crucial difference from the Arizona statute in *Ring*.

The Arizona statute contains significantly different language, mandatory language that is notably absent from the Washington statute. Compare ARIZ. REV. STAT. § 13-703 ("[i]n determining whether to impose a sentence of death or life imprisonment, the trier of fact *shall* take into account the aggravating and mitigating circumstances that have been proven. The trier of fact *shall* impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency. The trier of fact *shall* consider the following aggravating circumstances in determining whether to impose a sentence of death" (emphasis added)), with WASH. REV. CODE § 9.94A.120 ("The court *may* impose a sentence outside the standard sentence range for that offense if it finds, considering the purposes of this chapter,

that there are substantial and compelling reasons justifying an exceptional sentence." (emphasis added)) and with WASH. REV. CODE § 9.94A.390 ("[i]f the sentencing court finds that an exceptional sentence outside the standard range should be imposed in accordance with RCW 9.94A.120(2), the sentence is subject to review only as provided for in RCW 9.94A.210(4). The following are illustrative factors which the court *may* consider in the *exercise of its discretion* to impose an exceptional sentence. The following are *illustrative only* and are *not intended to be exclusive reasons* for exceptional sentences." (emphasis added)).

The decisions of the Washington courts confirm that as a matter of state law, the standard ranges do not limit judicial discretion in a manner that implicates due process or the right to a jury determination. Washington's sentencing guidelines simply add guidance and transparency to discretionary sentencing decisions. The guidelines identify traditional non-exclusive and non-binary sentencing factors to guide judicial discretion within a statutory maximum sentence. They further require the courts to set forth in writing the reasons for imposing a sentence beyond the presumptive range to insure that the sentence is based upon the evidence, is not based upon the court's conclusion that a more serious crime has been committed, and is reviewable by a higher court.

In a plain reading of the statute, the Washington Supreme Court has long held that WASH. REV. CODE § 9.94A.310 merely channels or structures discretion, and that WASH. REV. CODE § 9A.20.021 is the operative maximum. *State v. Ammons*, 105 Wash.2d 175, 181, 713 P.2d 719, 723, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). This is clear from the very beginning of the

statute. In its purpose section, the legislature declares that the system in WASH. REV. CODE § 9.94A "structures but does not eliminate discretionary decisions affecting sentences." WASH. REV. CODE § 9.94A.010. Sentencing discretion is "structured" such that courts have unfettered discretion within the narrow standard range, and less than absolute discretion outside the range. *Id*. The Washington SRA channels judicial discretion toward standard ranges, but does not mandate that sentences be within the range. If a court departs from the range, for the sake of transparency and appellate review, the statute requires a written explanation. The procedural safeguard prevents arbitrary sentencing decisions. *State v. Jacobson*, 92 Wash. App. 958, 968, 965 P.2d 1140, 1145 (1998).

The statute reads and the courts have frequently explained that in order to justify an exceptional sentence, a court must delineate the *substantial and compelling reasons* consistent with the purposes of the SRA which justify a nonstandard sentence. WASH. REV. CODE § 9.94A.120(2); *State v. Cardenas*, 129 Wash.2d 1, 914 P.2d 57 (1996) (reversing an exceptional sentence, holding that the fact of the victim's multiple injuries and the defendant's reckless driving in a residential neighborhood were not substantial and compelling reasons to depart from the standard range for convictions of vehicular assault and hit and run convictions); *State v. Allert*, 117 Wash.2d 156, 164, 169, 815 P.2d 752, 756, 759 (1991); *State v. Oksoktaruk*, 70 Wash. App. 768, 771, 856 P.2d 1099, 1101 (1993); *State v. Perez*, 69 Wash. App. 133, 137, 847 P.2d 532, 535, *review denied* 122 Wash.2d 1015 (1993). Reasons are not facts, but justifications as a matter of law. The non-exhaustive list of mitigating and aggravating circumstances are mere proffered "consider[ations]" for the court "in the exercise of

its discretion to impose an exceptional sentence." WASH. REV. CODE § 9.94A.390.

It is a court's discretion, and not the finding of any fact, that justifies an exceptional sentence. Discretion cannot be an element for the jury's determination. Therefore, when a defendant pleads guilty to a first degree theft of $8,000,000 agreeing to restitution in that amount, it is not the court's determination of this fact of the amount, but the determination as a matter of law that the theft was "substantially greater than typical" that justifies a departure. WASH. REV. CODE § 9.94A.390(2)(d)(ii). On review, the appellate court decides whether the factors are valid as a matter of law. *State v. Cardenas*, 129 Wash.2d 1, 5-6, 914 P.2d 57, 59 (1996).

"The underlying facts and nature of the crime committed can and should be a basis for an exceptional sentence." *State v. Perez*, 69 Wash. App. at 138. Under the SRA, "the crime of conviction became far more significant in determining the sentence." David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 96 (2001). These reasons "must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. Grewe*, 117 Wash.2d 211, 216, 813 P.2d 1238 (1991). Note, however, that a factor that is already considered in setting the standard range will not justify an exceptional sentence. *State v. Owens*, 95 Wash. App. at 626, 976 P.2d at 660 (citing *State v. Grewe*, 117 Wash.2d 211, 215-18, 813 P.2d 1238 (1991)); *State v. Perez*, 69 Wash. App. at 137. The defendant's conduct or circumstances must be "more egregious" than typically associated with the crime, "more onerous" than what the Legislature contemplated when setting the standard range. *State v. Cardenas*, 129

Wash.2d 1, 914 P.2d 57 (1996); *State v. Perez*, 69 Wash. App. at 138, *State v. Weaver*, 46 Wash. App. 35, 43, 729 P.2d 64 (1986), *review denied* 107 Wash.2d 1031(1987). Nor may the court justify an exceptional sentence with "elements of a more serious crime or additional crimes." WASH. REV. CODE § 9.94A.370(2).

In a recent unanimous opinion, the Washington Supreme Court has repeated that a sentencing court may depart from the standard range so long as an explanation is provided for an appellate court's review.

> The only restriction on discretion is a requirement to articulate a substantial and compelling reason for imposing an exceptional sentence. The reason relied on by the court may be one of the considerations listed in RCW 9.94A.390, but it need not be. The guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.

State v. Baldwin, 150 Wash.2d 448, 78 P.3d 1005 (2003) (en banc).

This is a requirement for transparency and nothing more. The court's explanation need not be one of the factors provided in an illustrative list. *Id.* Case law has expanded on this list. *See State v. Pryor*, 115 Wash.2d 445, 799 P.2d 244 (1990) (holding that future dangerousness is a valid aggravating factor in sex offenses).

In his discretion, the Honorable Judge Sperline determined that Mr. Blakely's deliberate cruelty in

"repeatedly and protractedly confining his victim in a coffin-like box" and his deliberate cruelty toward and intimidation of a minor child in committing the domestic violence kidnapping in the manner described was not deserving of a 49-53 month sentence "considering the purposes of chapter 9.94A RCW" but presented "substantial and compelling reasons" for an upward departure to the "just and deserved" sentence of 90 months. J.A. 49. This application demonstrates the operation of the statute. It was not factors of "deliberate cruelty" or "in the presence of a minor" per se that caused the upward departure. Nor was it the undisputed facts of confinement in a coffin and commission in the presence of a minor child which caused the departure. It was the court's discretionary determination that the purposes of the SRA were not served in imposing a sentence of 49-53 months for an atypically egregious second degree kidnapping, i.e., a question of law.

3. The Washington Court's Interpretation of State Law is Authoritative.

In *Apprendi*, this Court interpreted ARIZ. REV. STAT. § 13-703 and found it constitutional. This Court interpreted the statutory language to mean that "the jury makes all of the findings necessary to expose the defendant to a death sentence." *Apprendi*, 530 U.S. at 496-97; *Ring*, 536 U.S. at 603.

In *Ring*, the Court noted that it had misunderstood the operation of ARIZ. REV. STAT. § 13-703 in deciding *Walton v. Arizona*, 497 U.S. 639 (1990). *Ring*, 536 U.S. at 603-04. It had become clear that the Arizona Supreme Court interpreted the statute differently: that the

"[d]efendant's death sentence required the judge's factual findings." *Ring*, 536 U.S. at 603. Finding the state court's construction of state law authoritative, this Court determined the aggravating factor functioned effectively as an element of the crime. *Ring*, 536 U.S. at 603 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). *See also Winters v. New York*, 335 U.S. 507, 514 (1948) (A state court's interpretation of a statute "puts these words in the statute as surely as if it had been so amended by the legislature.")

It is apparent that but for the Arizona Supreme Court's interpretation, this Court would have upheld the defendant's sentence in *Ring* and would not have reversed *Walton*.

However, Washington courts have *not* construed the SRA in the way that the Arizona Supreme Court construed ARIZ. REV. STAT. § 13-703. No finding of fact is required for the imposition of an exceptional sentence. Absent the Arizona Supreme Court's interpretation, this Court would have upheld *Walton* on the statutory language alone. *Apprendi*, 530 U.S. at 496-97; *Jones v. United States*, 526 U.S. 227, 239 (1999) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"). The Washington statute is even clearer in establishing the statutory maximum and describing the mechanism of structured discretion composed of standard ranges and exceptional sentences. The Washington court's construction of the Washington statute, likewise, is authoritative. *Mullaney v. Wilbur*, 421 U.S. at 691.

4. The Arizona Death Penalty Statute Is Not Properly Compared with the Washington Sentencing Guidelines.

The *Ring* case is a death penalty case at its core, and "there is no doubt that death is different." *Ring*, 536 U.S. at 605-06. Context is pivotal in statutory construction, because "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

The Washington death penalty statute is not a part of the SRA, but is codified in an entirely different chapter at WASH. REV. CODE § 10.95. In Washington state, the only crime for which the death penalty is available is premeditated murder with a finding of at least one of the fourteen aggravating factors therein enumerated. The factor, by legislative definition and effect, is an element of the crime and must be found by a jury. WASH. REV. CODE § 10.95; 11 *Washington Pattern Jury Instructions: Criminal*, WPIC 30.0-30.04 (2d ed. 1994). Although the statute has not been re-written since the decisions in *Apprendi* and *Ring*, it clearly complies with this Court's holdings.

The SRA and in particular the sections regarding exceptional sentences, which require transparency of the court's discretionary decision within a fixed range, are incomparable with ARIZ. REV. STAT. § 13-703. The difference between life imprisonment and the death penalty is qualitative and deserving of special protections, whereas the difference between a standard range and the statutory maximum is quantitative and a proper discretionary matter. *See also State v. Xaviar*, 117 Wash. App. 196, 205-06, 69 P.3d 901, 906-07 (2003) (distinguishing *Ring*, noting that the Washington and Arizona statutes are fundamentally different, and interpreting the Washington statute).

The Arizona statute provides a finite or exhaustive list of ten specific and enumerated factors, any finding of which may raise the penalty to death. The finder of fact is ordered to find one of these factors before imposing a death sentence. The Washington statute, on the other hand, provides an illustrative list of considerations. The sentencing judge is invited to consider these circumstances and others in determining in his or her discretion whether a standard range or exceptional sentence better serves the purposes of the SRA. In imposing an exceptional sentence, a court may not base its decision on factors already considered in setting the standard range or on elements of a different or more serious crime, i.e., factors that are clearly elements. It is evident that what remains, and in particular the findings of the court at Mr. Blakely's sentencing hearing regarding the cruelty toward a child witness, are traditional and appropriate sentencing factors and not elements.

B. The Washington Courts' Construction of the SRA Is a Meaningful Interpretation of Legislative Intent That Does Not Manipulate the Definition of Criminal Acts to Avoid Constitutional Requirements, But Rather Identifies Traditional Nonexclusive Sentencing Factors to Guide Judicial Sentencing Discretion Within the Statutory Limits.

The Legislature has substantial discretion to define crimes and prescribe punishment. *Patterson v. New York*, 432 U.S. 197, 210 (1997). The *Apprendi* line of cases has expressed concern with the government's possible manipulation of the elements of crime. The government may not

shift the burden of proof on criminal elements. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Jones v. United States*, 526 U.S. 227 (1999). In *Jones* and *Apprendi*, this Court imposed a due process restraint on governments that focuses on the statutory maximum penalty. Thus, when a sentence exceeds this maximum, the fact which resulted in the sentence is effectively an element subject to the Jury Clause.

Such a manipulation does not exist in the Washington statute. The Court of Appeals affirmed Mr. Blakely's exceptional sentence solely on the basis of the effect of the crime on the witnessing son, not on the victim mother. J.A. 17-18. *See also* VRP2[6] 42 ("Mr. Blakely . . . put his son in the position of frantically reporting that to anyone he could notify. To watching it happen. That circumstance must forever imprint and distort the way that this child will think of his parents. Both of his parents.") The Respondent is unaware of any crime which has as an element the infliction of psychological trauma *on a witness*. Certainly such a factor has never been an element of the crime of kidnapping. *State v. Berry*, 200 Wash. 495, 505, 93 P.2d 782, 787 (1939) (The statutory definition of kidnapping does not omit any element of the common law definition).

Washington statutes do not remove elements from the jury's determination, but delineate various degrees of kidnapping, i.e., first degree kidnapping (a class A felony under WASH. REV. CODE § 9A.40.020), second degree kidnapping (a class B felony under WASH. REV. CODE

[6] VRP2 is the supplementary Verbatim Report of Proceedings transcribed by Official Court Reporter Joel Case for the sentencing hearing on July 31, 2000.

§ 9A.40.030), unlawful imprisonment (a class C felony under WASH. REV. CODE § 9A.40.040), and first and second degree custodial interference (a class C felony or misdemeanor under WASH. REV. CODE § 9A.40.060).

Under the 1909 criminal code, there was only one degree of kidnapping and it was punishable by a maximum term of life imprisonment. Seth A. Fine & Douglas J. Ende, *Washington Practice* Vol. 13A, §1603 (2d ed.1998). Under such a sentencing scheme, the judge had brought discretion to impose any sentence from no jail time to life and was not required to explain the basis for the decision. In 1933, the law provided for two degrees of kidnapping. *Id.* The maximum penalty for first degree kidnapping was death or life imprisonment at the jury's discretion. *Id.* The maximum penalty for second degree kidnapping was ten years imprisonment. *Id.* Further changes to the statute have not altered this ten year maximum, although the lesser crimes of unlawful imprisonment and first and second degree custodial interference further break down the crime into degrees. *Id.* It is clear that the legislature has not manipulated or re-labeled the code to avoid the *Apprendi* rule and shift the burden on elements. The legislature's decision to require some procedural safeguard or transparency with respect to discretionary sentencing decisions should not and does not render the exercise of such discretion constitutionally impermissible.

The non-exclusive, merely illustrative considerations in WASH. REV. CODE § 9.94A.390 are not traditional elements of crime. They do not regard or modify any particular crime, but may be significant in any crime (e.g. prior unscored criminal history not accounted for in offender score (WASH. REV. CODE § 9.94A.390(2)(j))). They are not black and white considerations resulting in mandatory penalties (e.g. armed/not armed (WASH. REV. CODE

§ 9.94A.310(4)), but complicated considerations properly weighed with a court's discretion (e.g. was defendant's cruelty, abuse of trust, or number of concurrent offenses significant enough to warrant a departure from the standard range and to what degree?). The considerations are not purely factual and not delimited in a finite and articulable list. Therefore, they are impossible to present to a jury.

The factors that determine the standard range, i.e., offender's criminal history and a "seriousness level" assigned to gross categories of crimes, represent only a small fraction of factors that traditionally inform a judge's sentencing decision. The ranges are narrow, 13-17 months in Mr. Blakely's case. It is clear that the legislature did not intend to rob the court of its sentencing discretion by mandating narrow ranges based upon the most general of factors, but only to set forth different degrees of discretion.

The Washington courts' interpretation of the statute does not evade the *Apprendi* rule, but provides the most meaningful reading of legislative intent in the context of several statutes. The context of the SRA is the rise of determinate sentencing systems which targeted "the tripartite problems of disparity, dishonesty, and [] excessive lenience." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990). While uniformity (i.e., the reduction of improper disparities) was a significant goal of determinate sentencing, *strict* uniformity demanding standard range sentences based on limited and general factors (offender score and seriousness level under the system of the SRA) destroys proportionality. Under a strictly uniform or charge offense system such as would result under the Petitioner's proposal, offenders are

sentenced for hypothetical, standard crimes rather than actual offenses. Dall, *supra*, at 1634 ("A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offense of which the defendant was convicted.")

Uniformity is not a greater end than individually tailored sentences based on traditional goals of retribution, deterrence, incapacitation, and rehabilitation. Reformers balanced the contrary goals of uniformity and individualized sentencing by structuring the court's discretion, providing absolute judicial discretion within narrow standard ranges and reduced discretion outside the range but within statutory limits. Dall, *supra*, at 1624 ("The legislative history suggests that Congress sought not to eliminate judicial discretion at sentencing but to limit that discretion in a meaningful and appropriate way while maintaining an individualized criminal justice system.")

In the words of Washington's own reformers:

> Recognizing that the solution to what was perceived as excessive judicial discretion was not to reject discretion entirely, the reformers sought instead the right mix of rule and discretion, the proper balance between the need for articulated principles governing sentencing and for flexibility to depart from the consequences of those principles when necessary to achieve a just result.

Boerner & Lieb, *supra*, at 123.

The departure function of determinate systems maintains judicial discretion within legislative limits and maintains individualized sentencing. Departures, then, are an essential part of the determinate sentencing

system. By undermining departures, the Petitioner is effectively asking this Court to find determinate sentencing schemes unconstitutional.

This Court has not found that U.S. sentencing guidelines are unconstitutional. The Washington guidelines are even more protective than the federal guidelines of a defendant's rights, as they prohibit the use of aggravating factors that duplicate crimes which could have been charged separately. WASH. REV. CODE § 9.94A.370(2) ("Real Facts Doctrine").

In the context of determinate sentencing systems, statutory language mandating transparency and reviewability was a response to criticism that indeterminate sentences had been dishonest. Dall, *supra*, at 1621. Departures are reviewed so that sentencing courts do not abuse their discretion but adequately support their decisions with evidence and reason on the record. The Petitioner misconstrues this language as creating a second and conflicting statutory maximum. No such conflict exists.

IV. The Defendant Received Notice of the Maximum Penalty of Ten Years.

A most appealing rationale of the *Apprendi* rule is protection of the constitutional rights of defendants to have notice of the crimes with which they are charged and the penalties to which they may be subject. *Ring*, 536 U.S. at 576 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 478 (recognizing the value in the "defendant's ability to predict with certainty the judgment from the face of the felony indictment"); *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *Almendarez-Torres v. United States*, 523 U.S. 224, 271 (1998) (Scalia, J., dissenting) ("it seems to me a sound

principle that whenever Congress wishes a fact to increase the maximum sentence without altering the substantive offense, it must make that intention unambiguously clear"); Bibas, *supra*, at 1139-42; Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 293 (1998).

The *Apprendi* issue is distinctly procedural, such that the formality of notice is central. *Ring*, 536 U.S. at 572 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 488; *United States v. Montalvo*, 331 F.3d 1052, 1061 (9th Cir. 2003). *See also* Dall, *supra*, at 1670 ("In the area of crime definition, formality for formality's sake is not unreasonable.") Defendants need notice to decide whether to go to trial or plead guilty. While the defendant Apprendi received notice via the prosecutor's recommendation to seek an enhancement, the statute to which he pleaded guilty informed him that his maximum sentence was ten years. His admissions alone did not subject him to a penalty over ten years.

Mr. Blakely, on the other hand, cannot complain that he had no notice that the maximum penalty for his crimes was ten years. The maximum penalty was plain in the charging information. J.A. 76. The standard range, on the other hand, was and is always absent from the charging document – the offender score being unknown so early in a prosecution. The maximum penalty of ten years was plain in the plea statement. J.A. 63. And it was plain in the statute. WASH. REV. CODE §§ 9A.20.021(1)(b) & 9A.40.030(3). The plea statement informed the Defendant that the sentencing judge was not bound by the standard range.

J.A. 66. And the judge repeated this orally. VRP 549-50 ("[D]o you understand that even though that would be the standard range, that the judge could sentence you above the standard range if the judge found compelling reasons to do that?").

There is no notice requirement for exceptional sentences, because "[t]he possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility." *Gunther*, 45 Wash. App. at 758, 727 P.2d at 260 (citing D. Boerner, *Sentencing in Washington* § 9.19 (1985)). Notice would be "redundant." *Id.*

Under the notice rationale of *Apprendi*, there was no violation in the instant case.

V. There Are Significant Practical Problems with Expanding the *Apprendi* Rule as the Petitioner Proposes.

The *Apprendi* holding is to be read narrowly. *Apprendi*, 503 U.S. at 474 (emphasizing the narrow scope of its holding); *Harris*, 536 U.S. at 567 (legislatures have relied on the Court's previous opinions such that extending the *Apprendi* rule is disfavored). The Court should be cautious in extending *Apprendi*. A broad interpretation undercuts the shared legislative and judicial goal of fairness to the defendant by exposing a jury to all the negative aspects of a defendant's conduct. *See also* Costello, *supra*, at 1251-52 (arguing that an over-broad interpretation of the *Apprendi* holding may violate the separation of powers doctrine, halting debate on sentencing reform and invalidating three decades of nationwide reform). Also "the States' settled expectations deserve [this

Court's] respect. . . . *Apprendi* can be read as leaving in place many reforms designed to reduce unfairness in sentencing." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

The Petitioner urges that every fact that affects the sentencing judge's decision should be found beyond reasonable doubt by a jury. This is not the law. *Apprendi* does not require that a jury determine any fact relevant to sentencing, but only those facts that raise the statutory maximum sentence. As long as the defendant's sentence does not exceed the statutory maximum, the defendant was not punished for a crime different than that proven to the jury. Moreover, the Petitioner's demand is impractical. There are "far too many potentially relevant sentencing factors [ ] to permit submission of many or all of them to a jury." Costello, *supra*, at 1254 & n.358.

It is impractical, if not impossible, for the prosecutor at the point of charging to know with prescience every detail of this particular crime and criminal that a sentencing court may find significant and to present these various facts as elements for the jury's verdict.

A prosecutor's time line is hurried. At the time that the offense is first reported, the prosecutor knows the bare minimum: e.g. that it is alleged that Mr. Blakely abducted his wife and son by force and threat of force. The state can only hold a suspect for 72 hours without charging. WASH. CRIM. R. 3.2.1(f)(1). If no charge is filed, the suspect must be released to the community where he or she may flee or reoffend. So the prosecutor charges on allegations of the bare elements. At this point, it is impossible for the prosecutor to know and charge every fact that might be relevant

to sentencing. It "makes little sense" to require the state to commit to what amounts to a sentence recommendation prior to trial when such recommendation would be ill-informed. *Gunther*, 45 Wash. App. at 758, 727 P.2d at 260.

If the defendant is charged and detained in jail, the state must proceed to trial within 60 days under the court rule for speedy trial. WASH. CRIM. R. 3.3(b)(1). Although the prosecutor and police investigate throughout this period, the witness testimony can never be fully anticipated. Details may emerge for the first time in trial testimony. It is not practical then to require the prosecutor to draft a jury instruction *before* the trial commences listing all facts that possibly may be relevant to the judge's sentencing decision.

It is not even practical to require the prosecutor to anticipate the sentencing court's discretionary rationale *after* trial. In Mr. Blakely's case, the Honorable Judge Sperline determined the reasons for an exceptional sentence without any assistance from the prosecutor. Although the court emphasized certain uncontested facts that informed its decision, the court's rationale that the crime was atypical and undeserving of a standard range sentence was its own discretionary assessment. The court is entitled to such discretion independent of the prosecutor.

Recalling a jury for a punishment phase is neither constitutionally required, nor practical. The *amicus* brief authored by the ACLU suggests the additional jury trials mandated by the Petitioner's claim are manageable in Washington state, because the number of exceptional sentences is a small percentage of all sentences. While it is

true that exceptional sentences are rare, it does not follow that jury sentencing on exceptional factors is manageable.

In 2002, only 4.21% (1173/27835) of all adult felony sentences in Washington were exceptional. State of Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing - Fiscal Year 2002*, 24 (2003) (visited January 14, 2004) <http://www.sgc.wa.gov/Stat%20Report%202002.pdf>. Exceptional sentences upward accounted for 2.26% (628/27835) of adult felony sentences; exceptional sentences downward accounted for 1.76% (490/27835); and exceptional sentences within the standard range (imposing conditions not normally available) accounted for 0.20% (55/27835). Id. However, the *amicus* fails to take into account that the vast number of convictions, about 95%, result from pleas. Under Petitioner's proposal, it is not 4.21% of trials that will conclude in jury trials at sentencing, but 4.21% of convictions.[7]

Looking at Washington caseload statistics, 34,353 (32,572+40+1741) defendants were found guilty in 2002. Of those, only 1741 went to trial. Washington Courts, *Superior Court Annual Caseload Report 2002*, 24 (visited January 14, 2004) <http://www.courts.wa.gov/caseload/superior/ ann/atbl02.pdf>. Seventy percent of all criminal trials were jury trials (1712/748+1712). Applying this percentage to trials resulting in conviction, we can estimate that about 1219 defendants were found guilty after a jury trial. If every exceptional sentence required another

[7] Note that these figures still underestimate the increase in trials under the Petitioner's demand, because they do not take into account the number of times the state requests but does not receive an exceptional sentence.

jury trial, there would have been another 1446 (34,353 x 4.21%) trials or more than twice the number of criminal jury trials across the state. If only exceptional sentences *upward* went to jury trials, another 776 (34,353 x 2.26%) trials would have clogged the courts.[8] Note that in 2002, there were only 395 jury verdicts on civil matters. Washington Courts, *Superior Court Annual Caseload Report 2002*, 23 (visited January 14, 2004) http://www.courts.wa.gov/caseload/superior/ann/atbl02.pdf. The increase in jury trials under Petitioner's proposal would not be manageable.

From another perspective, re-labeling sentencing factors as elements not only usurps judicial sentencing discretion in contravention of legislative intent, but also shifts the power to prosecutors who may choose to selectively charge these factors on high profile cases in order to control the sentence. *Harris*, 536 U.S. at 571 (Breyer, J., concurring); Dall, *supra*, at 1672-73. "Potentially, under such a scheme, the tail of sentencing wags the dog of the crime." Dall, *supra*, at 1672.

The Petitioner's proposed extension of the *Apprendi* rule is unmanageable and poor policy.

[8] The statistic of significance should include all exceptional sentences, not just upward departures, because "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury . . . ." *Richardson v. United States*, 468 U.S. 317, 326 (1984).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted:

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APPENDIX

UNITED STATES CONSTITUTION

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

RELEVANT PROVISIONS OF THE REVISED CODE OF WASHINGTON AS THEY EXISTED IN 1998 AT THE TIME OF THE COMMISSION OF THE CRIME

Chapter 9.94A
Sentencing Reform Act of 1981

9.94A.010 Purpose.

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve him or herself; and

(6) Make frugal use of the State's resources.

This section was revised in 1999 to amend (6) and add (7):

(6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

9.94A.100 Plea agreements – Criminal history.

The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed issues as to criminal history shall be heard at sentencing.

This section has been revised as WASH. REV. CODE § 9.94A.441.

9.94A.110 Sentencing hearing – Time period for holding – Presentence reports – Victim Impact statement and criminal history – Arguments – Record.

. . . The court shall consider the presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. . . .

This section has been revised as WASH. REV. CODE § 9.94A.500.

9.94A.120 Sentences.

When a person is convicted of a felony, the court shall impose a punishment as provided in this section.

(1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, a court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentencing range for that offense if it finds, considering the purposes of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

. . . .

(13) Except as provided under RCW 9.94A.140(1) and 9.94A.142(1), a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum crime as provided in chapter 9A.29 RCW.

Section.120 has since been revised as WASH. REV. CODE *§ 9.94A.505 and reads in relevant part:*

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range established in RCW 9.94A.510

. . .

(xi) RCW 9.94A.535, relating to exceptional sentences;

. . . .

(5) Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

9.94A.210 Which sentences appealable – Procedure – Grounds for reversal – Written opinions.

(1) A sentence within the standard for the offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under RCW 9.94A.120(5) shall also be deemed to be within the standard sentence range for the offense and shall not be appealed.

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

(3) Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond.

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

(5) A review under this section shall be made solely upon the record that was before the sentencing court. Written

briefs shall not be required and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

(6) The court of appeals shall issue a written opinion in support of its decision whenever the judgment of the sentencing court is reversed and may issue written opinions in any other case where the court believes that a written opinion would provide guidance to sentencing judges and others in implementing this chapter and in developing a common law of sentencing within the state.

(7) The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law. Such petition shall be filed with the court of appeals no later than ninety days after the department has actual knowledge of terms of the sentence. The petition shall include a certification by the department that all reasonable efforts to resolve the dispute at the superior court level have been exhausted.

Section .210 has since been revised as WASH. REV. CODE § 9.94A.585

9.94A.310 Table 1 – Sentencing Grid.

(1) Sentencing grid for crimes committed after July 26, 1997.

(The portion of the grid provided below illustrates the standard ranges for a crime of seriousness level V depending on offender scores 0 through 9 or more.)

	0	1	2	3	4
V	6-12m	12-14m	13-17	15-20	22-29

	5	6	7	8	9 or more
V	33-43	41-54	51-68	62-82	72-96

9.94A.320 Table 2 – Crimes included within each seriousness level.

(This section lists crimes grouped by seriousness levels I-XV. Kidnapping in the second degree is listed under seriousness level V. This section has been revised as WASH. REV. CODE § 9.94A.515.)

9.94A.370 Presumptive sentence.

. . . .

(2) In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard

sentencing range except upon stipulation or when specifically provided for in RCW 9.94A.390(2) (c), (d), (f), and (g).

Section.370 has since been revised as WASH. REV. CODE § 9.94A.530.

9.94A.390 Departures from the guidelines.

If the sentencing court finds that an exceptional sentence outside the standard range should be imposed in accordance with RCW 9.94A.120(2), the sentence is subject to review only as provided for in RCW 9.94A.210(4).

The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(1) Mitigating Circumstances

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or conduct to the requirements of the law, was significantly impaired (voluntary use of drugs or alcohol is excluded).

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors.

(i) The current offense involved multiple victims of multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially greater than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g. pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.127.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020 and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purposes of this chapter, as expressed in RCW 9.94A.010.

(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter as expressed in RCW 9.94A.010.

(k) The offense resulted in the pregnancy of a child victim of rape.

Section.390 has since been revised as WASH. REV. CODE § 9.94A.535. The revised section adds the following preface:

The court may impose a sentence outside the standard sentence range for an offense it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Whenever a sentence outside the standard sentence range is imposed the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of the conviction under chapter 9A.20 RCW.

9.94A.420 Presumptive ranges that exceed the statutory maximum.

If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.

Section.420 has since been revised as WASH. REV. CODE § 9.94A.599. The revised section adds the following sentence:

If the addition of a firearm or deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

Chapter 9A.20
Classification of Crimes

9A.20.010 Classification and designation of crimes.

(1) Classified Felonies.

(a) The particular classification of each felony defined in Title 9A RCW is expressly designated in the section defining it.

(b) For purposes of sentencing, classified felonies are designated as one of three classes, as follows:

(i) Class A felony; or

(ii) Class B felony; or

(iii) Class C felony.

(2) Misdemeanors and Gross Misdemeanors.

(a) Any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor. Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is

imposed, the committing of such act shall be a misdemeanor.

(b) All crimes other than felonies and misdemeanors are gross misdemeanors.

9A.20.021 Maximum sentences for crimes committed July 1, 1984, and after.

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by statute, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

Chapter 9A.40
Kidnapping, unlawful imprisonment, and custodial interference

* * *

9A.40.020 Kidnapping in the first degree.

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

(a) To hold him for ransom or reward, or as a shield or hostage; or

(b) To facilitate commission of any felony or flight thereafter; or

(c) To inflict bodily injury on him; or

(d) To inflict extreme mental distress on him or a third person; or

(e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

9A.40.030 Kidnapping the second degree.

(1) A person is guilty of kidnapping in the second degree if he intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by the defendant by a preponderance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent is to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

(3) Kidnapping in the second degree is a class B felony.

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